

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

B
P1-S

75-1065

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

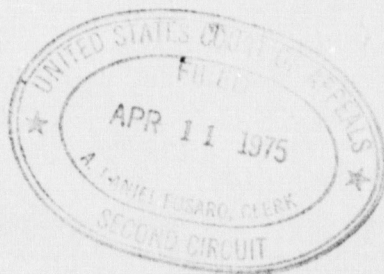
FRANK WINGATE and
KENNETH LUKE SMITH,

Appellants.

Docket No. 75-1065

APPENDIX TO THE BRIEF
FOR APPELLANT WINGATE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FRANK WINGATE
FEDERAL DEFENDER SERVICES UNIT
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SHEILA GINSBERG,
Of Counsel

PAGINATION AS IN ORIGINAL COPY

JUDGE FRANKEL

74 CRIM. 860

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Harry C. Batchelder, AUSA
FRANK WINGATE	264-6293
KENNETH LUKE SMITH	
	For Defendant:
	Katz Smith Max Btley

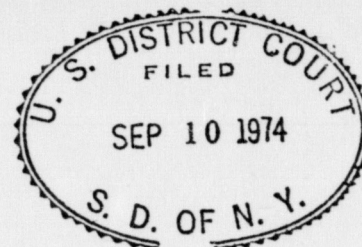
(07) ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk, 1 + 2					
Marshal,					
Attorney,					
XX COMMUNICATIONS CONX 21					
XX 846,812,841(a)(1),(b).					
Consp. to viol. Fed. Narco. Laws. (Ct.1)					
Distr. & possess. w/intent to dist.					
Heroin, I (Cts. 2&3)					
(Three Counts)					

DATE	PROCEEDINGS
9-10-74	Filed indictment.
9-23-74	Both defts. (attys. present) Plead not guilty. Motions returnable in 10 days. Both defts. released on their own recognizance. Case assigned to Judge Frankel for all purposes. Motley, J.
10-7-74	KENNETH L. SMITH - Filed notice of appearance by Robert A. Katz 233 B'Way NYC 233-0570
12-5-74	KENNETH L. SMITH - Filed affdvt. of debt in support of motion to suppress a statement.
12-20-74	F. WINGATE - Filed affdvt. of T.M. Fortuin, AUSA in support of a writ. ret. 12-26-74----

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
12-23-74	BOTH DEFTS - Filed Govt's bill of particulars		
12-23-74	FRANK WINGATE - Filed defts memorandum of law.		
12-23-74	K.L.SMITH - Filed order that deft's application for inspection of the Grand Jury minutes is denied etc....Frankel,J.		
12-27-74	FRANK WINGATE - Jury Trial begun... KENNETH LUKE SMITH		
12-30-74	Trial cont'd..Defts motion to acquit granted as to COUNTS 2 & 3 as to each deft.		
12-31-74	Trial cont'd.		
1-2-75	Trial cont'd. & concluded. Jury returns a verdict of GUILTY on ct.1 as to both deft's..Sentence 2-18-75..Deft's released on \$5,000 P.R.B. WINGATE bond to be co-signed by wife..Deft SMITH bond to be co-signed by common law wife..Both bonds to be signed by Jan.3-75.....Frankel,J.		
1-3-75	FRANK WINGATE - Filed personal recognizance bond unsecured in amt.of \$5,000.		
1-3-75	KENNETH LUKE SMITH - Filed personal recognizance bond unsecured in amt.of \$5,000.		
1-3-75	Filed Govt's request to charge		
1-3-75	Filed deft's requests to charge		
1-3-75	Filed notice of motion for deft Smith to examine Grand Jury minutes and to inspect and copy, for bill of particulars		
1-3-75	KENNETH LUKE SMITH - Filed deft's voir dire		
1-8-75	K.L.SMITH - Filed requests to charge jury		
1-8-75	Filed deft's Smith's voir dire		
1-8-75	Filed Govt's memorandum of law...		

D. C. 109 Criminal Continuation Sheet

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA

- v -

FRANK WINGATE, and
KENNETH LUKE SMITH,

Defendants.

INDICTMENT

(S) 74 Cr.

74 CRIM. 860

COUNT ONE

The Grand Jury charges:

1. From on or about the 11th day of June, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, FRANK WINGATE and KENNETH LUKE SMITH, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violated Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug-controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

MICROFILM

SEP 11 1974

B

MCB, Jr.:wp

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

(1) On or about June 13, 1974, the defendant WINGATE had a telephone conversation with an undercover officer of the Drug Enforcement Administration as to the price of narcotics and a proposed location for the transaction.

(2) On or about June 14, 1974, the defendant WINGATE had several telephone conversations pertaining to narcotics transactions from the Crotona Bar, at 1475

Boston Road, Bronx, New York.

(3) On or about June 14, 1974, the defendant WINGATE exited the Crotona Bar, 1475 Boston Road, Bronx, New York, approached an automobile occupied by co-conspirators but not co-defendants Jacob F. Edwards and Bernice Jones, conversed with them and returned to the Crotona Bar.

(4) On or about June 14, 1974, the defendant WINGATE accepted \$3,100 from an undercover officer of the Drug Enforcement Administration as advance payment for a sale of narcotics.

(5) On or about June 14, 1974, the defendant WINGATE exited the Crotona Bar, entered an automobile occupied by co-conspirators but not co-defendants Jacob F. Edwards and Bernice Jones, and the vehicle proceeded to the vicinity of 155th Street and St. Nicholas Avenue, Manhattan, New York, and entered the New Fat Man Steak House.

HCB,Jr.:wp

(6) On or about July 1, 1974, defendant FRANK WINGATE used a public telephone at the Crotona Bar, Bronx, New York, to engage in a conversation concerning his pending sale of a quantity of heroin.

(7) On or about July 1, 1974, the defendants KENNETH SMITH and FRANK WINGATE traveled by automobile in the vicinity of the Crotona Bar, Bronx, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 14th day of June, 1974, in the Southern District of New York, FRANK WINGATE and KENNETH LUKE SMITH, the defendants, unlawfully, intentionally and knowingly did attempt to distribute and possess with intent

to distribute a Schedule I narcotic drug controlled substance,
to wit, approximately one-eighth kilogram of heroin hydro-
chloride.

(Title 21, United States Code, Sections 812,
841(a)(1), 841(b)(1)(A), and 846.)

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of July, 1974, in the
Southern District of New York, FRANK WINGATE and KENNETH
LUKE SMITH, the defendants, unlawfully, wilfully and
knowingly did attempt to distribute and possess with intent to
distribute a Schedule I narcotic drug controlled substance, to
wit, approximately one-eighth kilogram of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1),
841(b)(1)(A), and 846.)

Richard E. Eberly
FOREMAN

Paul J. Curran
PAUL J. CURRAN
United States Attorney

FRANKEL, J.

SEP 23 1974

& Both Defts appear
(att'y Joseph Zedrosser & Robert Katz
appear) Both Defts plead n/g
Case assigned to Frankel, J. as a
separating indictment to 74-6-810
5 days for motions. Both Defts
are ROR

DEC 2 1974

AUSA FORSON
AP Motley, J.
Appearing on by Smith motion to suppress
commenced. Motion denied.
Jury trial as to each deft with
attys present, commenced.

DEC 3 1974

Trial continued. By motions to
disqual granted as to Counts 2+3
as to each defendant.

DEC 3 1974

JAN 2 1975

Trial continued.
Trial continued & concluded.
Jury return a verdict of Guilty
as to both defendants. Sent
date Feb-18, 1975. By both defts, released
on \$500 P.R.B. - deft Wangate bond to
be signed by wife. deft Smith bond
to be co-signed by common-law wife. Both
bonds to be signed by Jan 3, 1975.
Frankel, J.
CW

ACSA FORTUIN

FEB 18 1975

d
Deft WINGATE, atty (John Curley) pres. Sentence
to 3 yrs. Pursuant to Sec 3651, T18, def is to be
confined in a Jail Type Institution for a period
of six (6) mos. Execution of remainder of
sentence suspended, defend. placed on Prob
for a pd of 3 yrs following release. Spec.
Parole of 3 yrs. Deft ^{could} ~~release~~ on \$5,000, P.R.B.
pending appeal

d
Deft SMITH, atty (Joyce K. Barlow) pres.
F.S.S. 3 yrs probation. Spec Cond of Prob.
def to continue in the program of drug therapy
in which he is now participating, and that
if he proves his connection with Reality
House here it is deemed to be desirable
in the judgment of the people in charge
of that program and the Probation Office
this may be considered as a factor
possibly requiring the Court to consider
the revocation of his probation.

Franklin J.
(Ru)

1/2/75

jwh 1

United States of America
vs.Frank Wingate and Kenneth Luke
Smith

CHARGE OF THE COURT

(Frankel, J.)

THE COURT: All right, members of the jury, you have heard the evidence in this relatively brief trial. You have heard the arguments of counsel urging what they believe on one side or the other, or contend on one side or the other you should find from the evidence. Arguments as you know tend to become rhetorical and lyrical, but you will understand that though lawyers properly engage in efforts to persuade you, in the end what you are persuaded of is the function of what you find to be the truth from the evidence that has been placed before you.

You will remember throughout your deliberations that it is the evidence on which you must concentrate and it is the truth that you are to be seeking from that evidence. My task is relatively simple, which is to instruct you on a few rules of law that govern this case. I am to give them to you as they come to me from Congress or higher courts and not make them up as I go along, and, of course, it is your duty to take them as they have been given to all of us and apply them faithfully to the truth as you find it to be.

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2 I have told you to concentrate on the evidence
3 and I have told you what it is and you know what it is.
4 It is customary and essential to remind you of these things
5 in the instructions and I do that now.

6 You will have in mind that the evidence is testimony,
7 the sworn testimony and exhibits. You will have in mind
8 that whatever other purposes they serve, the things that
9 counsel have said to you and the things that I say to you are
10 not evidence.

11 I asked the clerk of the court for our convenience
12 to give you each a copy of the indictment, the accusations
13 against these defendants. Remember that it is not evidence.
14 It helps you to understand what the case is about, what
15 the issues are, but it is not proof of anything.

16 Rulings by the court on one thing or another are
17 not evidence. This has been a brief and orderly and I think
18 peaceable trial, but remember it is not a question of who
19 won or who made or lost the most objections. It is not a
20 popularity contest as among the lawyers. It is, to repeat
21 for what I hope will be the last time, a search for the truth.
22 And that is your critical task.

23 Now, in response to that indictment which you have
24 before you both defendants have pled not guilty and that
25 means that the burden has been undertaken by the

1 jwh 3

2 government to prove them guilty beyond a reasonable doubt
3 before either of them may be convicted here. Defendants
4 in a criminal case don't have to prove their innocence,
5 they don't have to prove anything. They are as they come
6 here and as they sit here now presumed to be innocent and
7 that presumption is enough in itself to require you to acquit
8 them until or unless you are convinced of their guilt beyond
9 a reasonable doubt.

10 Now, a defendant having no burden to present
11 evidence has an absolute right to judge for himself and with
12 his lawyer whether or not he will take the stand. And you
13 know, you have been observing, that one defendant chose
14 to testify, the other didn't. As to Mr. Smith who didn't
15 take the stand, remember that it is his absolute right not
16 to do so. The fact that he didn't take the stand may not serve
17 to prejudice him in any way. You should not consider it
18 against him.

19 To put it more simply, the fact that he didn't
20 take the stand should play no part in your deliberations
21 whatsoever.

22 Now, we have all talked here repeatedly, as it is
23 a fundamental and basic thing, about the burden of proof
24 beyond a reasonable doubt. Let me reelaborate on that and
25 attempt to convey to you the sense of what it means. It means

1 jwh4

2 what the words literally undertake to convey; it means a
3 doubt that has its origin in your reason applied to the
4 record of evidence in the case before you. The notion of
5 proof beyond a reasonable doubt is not an excuse to avoid
6 performing an unpleasant duty. It is not a guise or pretext
7 for extending sympathy to anyone.

8 A reasonable doubt is the kind of doubt that
9 would cause a prudent person to hesitate before taking
10 action in some matter of importance to himself or herself.
11 If I may spell that out a little bit, if you have, as all
12 of us have from time to time, some serious, important de-
13 cision to make and if you proceed to view coolly and ob-
14 jectively all the facts and factors that have a bearing on
15 that decision and at the end of that review you find yourself
16 beset by uncertainty and unsure of your judgment you have
17 a reasonable doubt.

18 The converse of that is also true. If you have
19 such a decision to make and if you proceed to the kind of
20 objective consideration I described to everything bearing
21 on that decision and if at the end of that process you
22 didn't have that kind of uncertainty or reservation then you
23 would not have a reasonable doubt.

24 Proof beyond a reasonable doubt does not mean proof
25 beyond any conceivable doubt or proof to a positive or

1 jwh5

2 mathematical certainty. If it meant that then nobody could
3 ever be convicted in any trial in a criminal case concerned
4 with trials or with issues of fact. It is in the nature
5 of issues about matters of fact, and most clearly about
6 matters of fact that lie in the past, that they are not
7 capable of being proved one way or another beyond any doubt
8 or to a positive or mathematical certainty. The law deals
9 in probabilities and we do here in the criminal law as well.
10 So when we speak of proof beyond a reasonable doubt, we
11 don't mean proof beyond any doubt.

12 On the other hand, though, I have spoken also
13 of probabilities, it is important for you now to have in mind
14 that the probability of guilt must be a very high one in
15 a criminal case before a jury may convict, that the burden
16 of proof on the government is a very high one and that you may
17 convict only if in the end your minds are free of the kind
18 of uncertainty and the kind of reservation I have spoken
19 about.

20 Now, with those thoughts in view let's approach
21 the specific case before you and the specific problems it
22 will present for your decision.

23 First, by way of background, and perhaps to make
24 intelligible some of those numbers and letters in the in-
25 dictment as you may hereafter be looking at it, let me call

1 jwh6

2 your attention or remind you that in the federal system
3 there are no crimes except as Congress in laws it has
4 enacted has declared certain conduct to be criminal. That
5 is to say, we don't have common law crimes as used to exist
6 in our legal system. All crimes are defined by statute.
7 And so underlying every indictment in the federal court,
8 underlying this indictment, there is some statute or statutes,
9 some laws enacted by the Congress,

10 Now, the laws that underlie this case are laws
11 in which Congress has said that it is unlawful to distribute
12 or to possess with intent to distribute a certain so-called
13 narcotic drug controlled substance. One such substance is
14 heroin. And so it is unlawful to distribute or possess with
15 intent to distribute the drug called heroin.

16 It is also under those same statutes unlawful
17 to conspire to do these things. And as you know, in shorthand
18 terms at least, this case is about an alleged conspiracy
19 to distribute or possess with intent to distribute heroin.

20 Now, this indictment as it now stands and as
21 copies have been placed before you contains a single count.
22 You may recall there were three counts when the case originally
23 came on to be tried. The second and third counts have been
24 withdrawn from you for reasons of law that need not concern
25 you. You are concerned with this charge of an illegal

jwh7

conspiracy to deal in heroin.

Before we go to the specifics of that charge and the issues you will consider, let me just say very generally a few words about the nature of the concept of conspiracy in our law.

A conspiracy, as I shall be repeating in a minute or so, is an agreement or combination to work together by two or more people to commit some illegal or criminal act. The gist of this concept of conspiracy is the agreement or understanding or combination and because that is the heart of the matter in our law, as in our systems of law, a conspiracy may be a crime separate and complete in itself apart from the so-called substantive offense which is the object or purpose or goal of the conspiracy.

Now, let me make that long sentence intelligible to you. Let's consider the crime of homicide which is unrelated with anything which you have to concern yourselves with here. You can have a conspiracy to commit a murder and the crime of conspiracy could be made out to be established, the people accused of conspiracy could be convicted even though the murder was never actually carried out because as I say the gist of the crime of conspiracy is the unlawful agreement plus an overt act or more than one overt act - and I will be talking with you about that. And as I say you can have the

1 jwh8

2 conspiracy though the substantive offense was never com-
3 pleted.

4 Now, here the alleged substantive offense was
5 the possession of heroin with intent to distribute it or
6 the distribution of heroin. And there is no substantive
7 offense claimed or established as the case comes before you
8 for your consideration. There is a charge of conspiracy,
9 the unlawful agreement and that is the thing that you will
10 be concentrating on in your deliberations.

11 Now, for your convenience, as I said, and for
12 the convenience of all of us I have given you that indictment.
13 I am not going to read it to you and I would just as soon you
14 don't spend time on reading it while we go on with these in-
15 structions, but it may be convenient and useful to you to
16 refer to it as we go along.

17 This indictment, as you see looking at the first
18 page, charges a conspiracy that began on or about June 11th
19 of what is now last year and extended for a period up to
20 the filing of the indictment in the form of a pleading.

21 It says in the first paragraph that it was a
22 conspiracy in which the defendants with others, known or
23 unknown to the Grand Jury, agreed and combined and so forth
24 to violate certain enumerated statutes. I have told you about
25 those statutes. They forbid possessing with intent to

1 jwh9

2 distribute heroin and other narcotic substances.

3 And the second paragraph on the first page says
4 that the conspiracy was designed and had as part of it the
5 object of the distribution and possession with intent to
6 distribute. Then if you will just look by way of anticipation
7 on the next page, you will see that it contains a list
8 running on to page 3 of 7 overt acts so called. And I shall
9 be talking to you about them and their significance in this
10 case in a little while.

11 At this point let me tell you, because this now
12 focuses you on exactly the matters you are to think about,
13 let me tell you the essential elements, so called, of this
14 offense of conspiracy as charged in this case.

15 Before you can convict either defendant you must
16 be satisfied beyond a reasonable doubt on each and every one
17 of three essential elements. Each and every one means that
18 if you are not satisfied on any one of them you would have
19 to acquit. For a conviction the government must prove
20 all three.

21 Now, let me tell you those three essential elements.

22 First that for some period of time between June 11,
23 1974, and the arrest in this case on the morning of July 2nd
24 there was a conspiracy of the kind the government alleges
25 in this indictment, namely a conspiracy that had as its

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2 object the unlawful distribution of heroin or the possession
3 of heroin with the intent to distribute it.

4 The second essential element is the requirement
5 of proof that the defendants here on trial, or either of
6 them, knowingly and intentionally participated in the con-
7 spiracy.

8 The third essential element is that one of the
9 conspirators committed at least one of the overt acts set
10 forth in the indictment during the conspiracy and for its
11 purpose.

12 Let me go back over each of those essential ele-
13 ments and explain them just a little bit. As to the first,
14 the requirement of proof that the conspiracy alleged actually
15 existed goes back to the basic concept I told you about before,
16 and since it is basic, I will be repeating a little bit
17 the things that I said earlier. A conspiracy, the purposes
18 of this and in most criminal cases is a combination or
19 agreement between two or more persons to act together to
20 take concerted action to accomplish some criminal purpose.
21 As I said it is the unlawful agreement or combination that
22 is the gist of this crime of conspiracy.

23 It is frequently said that a conspiracy is a kind
24 of partnership in crime. So in this setting you hear words
25 familiar to people like agreement and partnership. You

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2 understand, though, that it isn't necessary in a conspiracy
3 case for the government to prove an agreement or a partner-
4 ship in any formal or standard or familiar sense of those
5 words in the law and in life. Your common sense will tell
6 you that if and when people get together to agree on the
7 commission of some crime, if and when people enter into
8 a criminal conspiracy much is left unexpressed, much is left
9 to tacit and informal understanding. But you will also under-
10 stand that there must have been what amounts to a clear
11 understanding between two or more conspirators to engage
12 in the illegal enterprise before this element, this first
13 and basic element of conspiracy could be made out.

14 So since you are determining whether that has
15 been proved and since you will understand that if a conspiracy
16 exists it is sometimes proved in ways other than by showing
17 the language of agreement or standard contract terms, you
18 will understand that in this as in many cases charging con-
19 spiracy you will be looking at the pattern of conduct that
20 the evidence makes out to you, you will be looking for the
21 course of events and relationships, however long or short,
22 you will be looking to put together all these events
23 and actions and relationships and to determine from that
24 kind of synthesis whether or not the government has estab-
25 lished beyond a reasonable doubt that the conspiracy alleged

1 jwh12

2 actually existed.

3 Now, I told you, and I repeat, that a conspiracy
4 may be made out, may be proved whether or not the object,
5 the substantive offense was ever carried out. The conspiracy
6 may exist, in other words, whether or not it succeeded in
7 achieving whatever its purpose may have been.

8 You will be then reviewing all the evidence.
9 You will be determining from that evidence what it shows
10 and what it may fail to show. And taking all the evidence
11 together you will decide whether the kind of illegal agreement
12 or combination or understanding alleged in this indictment
13 was in existence during the period alleged in the indictment.

14 Now, I said during the period because if you find
15 that there was a conspiracy, the exact length of its life
16 is not a matter of any special consequence here. I told you,
17 and you see it before you, that the charges of the conspiracy
18 extended from June 11th up to the date of the indictment.
19 The government isn't required to prove that the conspiracy
20 existed for the whole of that period, or indeed anything like
21 it.

22 If you find that a conspiracy like the one alleged
23 has been proved to have existed so far as its length or
24 duration is concerned it would be sufficient if it existed
25 for any time during that period alleged in the indictment.

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2 A conspiracy, as you would know, and as I instruct
3 you in any event, may exist, may be completed, may be a
4 full agreement of the kind the law denounces even though it
5 lasts only hours. You must find some duration, but I repeat
6 it need not endure for as long as the period alleged in the
7 indictment.

8 Now, if you are not satisfied that there was
9 such a conspiracy for some time during the period alleged
10 your task in this case will be ended and you will be expected
11 and required to return a verdict of not guilty as to both
12 defendants.

13 If you find the conspiracy has been proved,
14 that being the first essential element, you will, at least
15 if you proceed logically, turn to the second essential
16 element, the requirement of proof of participation or
17 membership in a conspiracy.

18 That question of alleged membership must be con-
19 sidered and decided by you with specific and particular
20 and individual reference to each of the two specific and
21 separate individuals on trial before you. And what I am
22 saying in saying that to you is that in a conspiracy case,
23 as in others, the question of the guilt or innocence in our
24 law is an individual one and each individual has a right
25 to be considered on his own for this kind of serious purpose.

1 Wh 14

2 We don't follow and you won't follow doctrines of guilt
3 by association in considering this conspiracy case.

4 So the participation of any defendant, of either
5 of these defendants, in a conspiracy, if you find there was
6 a conspiracy, needs to be judged, needs to be considered
7 by considering what the evidence shows as to his own words,
8 his own action, his own intent. These things, as in many
9 areas of human understanding and of factual investigation,
10 will of course be considered by you in relation, where you
11 find there is relation, in relation to these statements and
12 actions and events involving other people. That is to say,
13 you know whether in a law court or anywhere else that the
14 things that people do and the things that people say fre-
15 quently take on meaning, frequently become intelligible only
16 when they are considered in relation to the things other
17 people do and the things other people say.

18 And so to the extent that you find relationship,
19 to the extent that you find events following one another,
20 to the extent that you find events interrelating with each
21 other, obviously those relationships will have a bearing on
22 your understanding and on your judgment.

23 But then in the end you will also understand
24 that the question whether either Mr. Smith or Mr. Wingate
25 was a member of the alleged conspiracy will be a question to

1 jwh15

2 be decided on the basis of what the evidence tells you about
3 him; about what he said or did or what he intended or what
4 he didn't do or say at the time here in question.

5 So to summarize that, you will focus on each in-
6 dividual. That may, it will require you to consider what
7 other people did and said at various times during the course
8 of this case. It results that in focusing on each individual
9 you are expected and entitled to look at all the evidence
10 before you and consider it in determining what it tells you
11 specifically about each of the two separate individual
12 defendants before you.

13 I have said you may and should look at all the
14 evidence and I hasten immediately to put two restrictions
15 or qualifications on that. In the particular setting of
16 this case there are two exceptions, and I think it will be
17 clear to you in any event that they exist, but I must
18 particularly instruct you about them.

19 You heard some evidence, to give you the first ex-
20 ception, of alleged dealings between the witness Tyre and the
21 defendant Wingate relating to times before the period alleged
22 in this indictment. Whatever that evidence does or doesn't
23 tell you I now instruct you that you may consider it only
24 as against the defendant Wingate. It has no bearing on
25 the defendant Smith.

1 jwh16

2 Now, secondly, we have a kind of reverse situation.
3 You have heard of statements said to have been made by Mr.
4 Smith following the arrest of both defendants in the early
5 morning of July 2nd. Any statements that you find were made
6 by Mr. Smith after the arrest may be considered only as
7 against Mr. Smith. They have no bearing or significance
8 with respect to Mr. Wingate.

9 To find that a defendant was a member of a con-
10 spiracy you must find that he knew the unlawful purpose
11 of the enterprise and knowingly associated himself with it.
12 The government must establish beyond a reasonable doubt
13 that a defendant entered into a conspiracy aware of its
14 basic nature and its basic purpose and intending to parti-
15 cipate in carrying out that purpose. Here is a specific
16 criminal intent, the intent to violate the law in a narcotics
17 transaction about which I told you. And when I say the intent
18 to violate the narcotics laws that does not mean obviously
19 that to be found guilty a defendant must be shown to have
20 known of the specific statutes or enactments under which
21 he stands accused, but he must be shown to have known that
22 the kinds of narcotic transactions in which he was agreeing
23 to engage are transactions denounced, forbidden by the
24 criminal law.

25 Now, mere association with one or more conspirators

1 jwh17

2 or presence with one or more people who are conspiring to
3 commit a crime does not in itself make anybody a member of
4 a conspiracy. Similarly knowledge that there is a conspiracy,
5 that people with whom you are present are engaged in a
6 conspiracy, knowledge without participation is not sufficient.
7 What is necessary, to repeat what I have already told you,
8 is a showing that a defendant became associated with the
9 scheme or the plan or the transaction knowing its purpose
10 and intending himself to act in some way to bring about
11 or achieve that purpose.

12 If a person participates in that sense with
13 knowledge he may become a conspirator, a member of the
14 conspiracy even though he engages or participates in only
15 some parts of it.

16 Actually, whether or not it has any bearing on your
17 understanding of the evidence in this case it may be said,
18 because it is the law, that you can be a member of the con-
19 spiracy even though you don't know all the other members
20 of the conspiracy. The question in any event, to repeat
21 and summarize it, is whether a person has voluntarily joined
22 in the conspiratorial venture knowing what it was about
23 and desiring and intending by his own participation to
24 bring it to completion, to accomplish its objective.

25 The indictment charges, and the statute speaks

1 jwh18

2 in similar words, that these defendants intentionally
3 and knowingly conspired. And I have been talking about
4 membership, I have been talking about the knowledge
5 necessary before a membership in a conspiracy can be estab-
6 lished. You can't become a member of a conspiracy unaware,
7 in ignorance of what you are doing and what it is about.
8 And as I say, we covered that, but those words knowingly
9 and intentionally are used to identify a basic element in
10 the law, the element of criminal intent and so I dwell on
11 them and expand on them a little bit beyond what I talked
12 to you about in connection with this question of membership.

13 I say to you that although the words are central,
14 they are vital. They are not very complex, and they are not
15 very complicated in this case. In general, as background
16 to your consideration of this question of membership,
17 have in mind that when we speak of actions taken intentionally
18 and knowingly in the sense that concerns us here we are
19 speaking of things that are done deliberately, voluntarily,
20 purposely, with an awareness of the nature and object
21 and possible consequences of those actions, not things that
22 are done by mistake or accident or negligently or by in-
23 advertence.

24 As I said to you before, to act knowingly a person
25 does not need to know specifically that he is violating a

1 jwh19

2 particular law that he could cite or quote or identify,
3 but in this case again to make out that element of criminal
4 intent a defendant must be shown to have realized that he
5 was planning, agreeing to engage in transactions relating
6 to narcotics and to have known that such transactions were
7 forbidden somewhere by the criminal law governing his behavior.

8 These characteristics that make of knowledge
9 or intent cannot be proved by so-called direct evidence.
10 When you are talking of intent you are talking of the quality
11 or function of the human mind. It is a fact like other facts,
12 but it is a fact we are in the habit of ascertaining by
13 so-called circumstantial rather than direct evidence. We
14 don't commonly have means for looking into a person's mind
15 or knowing by direct observations what he believes and knows
16 or intends. So we are in the habit in our daily lives
17 and in the courtroom as well of relying on circumstantial
18 evidence to decide whether a person knows what he is doing,
19 whether he intends to be doing a particular thing, what his
20 motives and objects and desires may be in engaging in
21 particular conduct. And you will make that kind of study
22 of the evidence in this case for the purpose of ascertaining
23 from all the circumstance whether these defendants, or either
24 of them, knowingly and intentionally became members of the
25 conspiracy the government charges.

1 jwh20

2 And now I come to the third and last of the three
3 essential elements. If you find there was a conspiracy,
4 if you find that either of those defendants were members
5 you may still not convict unless you are also satisfied
6 beyond a reasonable doubt that at least one of the overt
7 acts alleged in this indictment was committed during the
8 conspiracy and with the object of furthering the conspiracy.

9 A word or two about the theory of that. It is
10 the theory of our law generally, and in this particular case,
11 that people might talk about engaging in some criminal conduct
12 and then not make a single move or take a single step toward
13 carrying out that kind of illegal enterprise. It is our theory
14 that if no such single act or step occurred people ought not
15 to be found guilty of crime because of mere talk of the
16 nature of the agreement. So it is required before the crime
17 of conspiracy may be found to have been committed at least
18 one overt act must be proved.

19 When you turn to pages 2 and 3 of this indictment
20 as you can see there are 7 overt acts alleged. Overt acts
21 may be things that are not in themselves criminal or wrongful.
22 It is not criminal or wrongful to have a conversation in
23 a car or to be in a car and that kind of behavior is included
24 among the things alleged under the heading of overt acts.

25 Nevertheless, I tell you that one of those things

1 jwh21

2 must be proved before the conspiracy charge may be completely
3 established. In telling you that I should also say that
4 the government is not required to prove more than one, but
5 it must prove at least one of those acts committed by at
6 least one conspirator before the crime may be established.

7 Now, those are the essential elements that you
8 are to consider. Let me give you some general thoughts
9 that are also rather standard about the ways you will go about
10 considering these things and the responsibilities you will
11 have together in the jury room.

12 One of your tasks, as you know, is to judge, to
13 appraise the credibility of witnesses. You rely on the
14 witnesses to tell you what happened and the extent to which
15 you may rely on them involves you in standard and critical
16 jury work - the assessment of credibility.

17 There is nothing technical and there is nothing
18 specially legalistic about that subject even though it is
19 a regular and necessary part of jury instructions.

20 Lawyers and judges are not specially expert
21 in judging credibility. It is not a specialty to people
22 legally trained - at least that is the theory of our system
23 of trial by jury. We bring to the courthouse citizens like
24 yourselves, normally not trained in the technicalities of
25 the law in the belief that you will bring with you your

1 jwh22

2 collective wisdom, experience, knowledge of people and
3 the way the world works and that you will apply those things
4 to the witnesses you have seen and heard in making your
5 judgments of credibility.

6 You will be asking together how each of these
7 witnesses impressed you. Did the witness seem to be frank
8 and direct and forthright? Did he seem to know what he was
9 talking about? Did he seem, if he knew what he was talking
10 about, to have a purpose to tell you accurately what he knew?

11 You can compare direct with cross-examination.
12 You may consider the intrinsic plausibility of the testimony
13 or any item of the testimony. You may consider contradictions
14 within a witness' testimony and between the testimony of
15 one witness and that of another.

16 You will remember when you are judging credibility,
17 what we talked about last Friday when you came here to be
18 selected to serve on this jury, that all of the witnesses
19 start out equal as they come before you. It doesn't matter
20 who called them or who they are - each is to be judged
21 on his own.

22 In the end presumably you will find some witnesses
23 more reliable than others, more truthful than others, but
24 that is not a function of their status or the side they are
25 supposedly on, it is a function of your judgment of each of

1 them as individual human beings.

2
3 If you find that a witness has given you in-
4 accurate or false testimony you will want to consider, as
5 I said or indicated, whether that was the result of a lie
6 or a mistake. You will want to consider whether any inaccura-
7 cies related to things central in the case or to peripheral
8 or incidental things.

9 This is true of all defects in the testimony.
10 Consider whether any inaccuracy, any contradiction, any
11 inconsistency, suggests to you a deliberate intention to
12 mislead you or some accident of human fallability and
13 make your judgment of credibility accordingly.

14 If any witness in your judgment has wilfully
15 testified falsely to you about a fact material in the
16 case it is up to you to decide and you are free to decide
17 whether you will reject all of the testimony he gave you,
18 or you may credit such parts of the testimony as you find
19 believable and useful for your critical task of finding
20 the truth.

21 Now, in considering credibility we are all in
22 the habit from time to time of considering the interest
23 or motive of a person who tells us some alleged fact or
24 other. It is obviously a factor that we weigh together
25 with other factors in deciding how far we may rely on any

1 jwh24

2 account given to us by somebody about something of con-
3 sequence. It is a factor that you will weigh and consider
4 together with other factors bearing on credibility. You
5 know, for example, whether it was mentioned to you or not,
6 that a law enforcement officer may have an interest in
7 the outcome of the case with respect to which he has taken
8 official action. You will know at the same time that the
9 fact that a law enforcement officer has an interest in
10 enforcing the law does not by any means signify that you
11 can't rely on his testimony.

12 You will know that a defendant who takes the
13 stand in a criminal case has a deep and obvious interest
14 in the outcome of that case. Again you will know by the
15 same token that the fact that a defendant has an interest
16 does not signify that his interest is for that reason to
17 be rejected. In other words, generally the existence of
18 an interest doesn't mean that the witness is to be disbelieved.
19 If it meant that we would solve the problem by never allowing
20 interested people to testify.

21 I call your attention to this subject of interest
22 merely to remind you, as I say in general and soon in somewhat
23 more specific terms, of a factor that you are to consider
24 with the others in making judgments about credibility.

25 Then, as I have indicated, there is one aspect

1 jwh25

2 of this subject of interest that will presumably play a
3 special part in your deliberations as it has in the summations
4 you have just heard. That is the subject of so-called in-
5 formant's testimony and that involves some special observa-
6 tions about the witness Marrell Tyre who came before you
7 as an informant in this case.

8 In thinking about that you will realize that the
9 government, the prosecution frequently considers itself
10 compelled to rely on the testimony of an informant, of persons
11 who have themselves engaged in criminal conduct who come
12 to testify in prosecutions against other people. The prose-
13 cution takes the position, and there really isn't any quarrel
14 about the legitimacy of his position, that it must take
15 the witnesses as it finds them in performing the function
16 of enforcing the criminal law. In any event, there certainly
17 is no prohibition against the use of informants in the trial
18 of criminal cases.

19 You are instructed, however, that you must
20 scrutinize the testimony of an informant with particular care
21 and deal with it with particular caution in determining
22 whether you will find it to have been credible. You want to
23 take into account the evidence you heard and the arguments
24 you have heard as to what may have been the motive of Mr. Tyre
25 in giving the testimony that you heard. Was Mr. Tyre's

1 jwh26

2 testimony a fabrication in whole or in some critical part
3 induced by benefits that he expected or hoped to receive
4 for that? Was he lying because of some promise or some
5 belief that he might receive favorable consideration in
6 connection with his own difficulties with the law?

7 Or did he, whether in the exercise of conscience
8 or in an astute judgment as to his own selfish interest,
9 did he take the stand and tell you the truth, wholly or in
10 part?

11 Do you believe that he would curry favor with the
12 prosecutor or with law enforcement officers by lying, perhaps
13 to them, and to you, or did he think it best, whether in his
14 selfish interest or otherwise to come here and tell the truth
15 as he swore he would do?

16 Did he in short believe that it would be best
17 for him, for whatever reasons he saw in this picture affecting
18 himself, did he think it would be best for him to make false
19 accusations or to tell truthfully damaging things that he knew
20 or was in a position to know firsthand?

21 Now, those questions are of such a nature that, as
22 I say, you would presumably be considering them in any event
23 in appraising the credibility of Mr. Tyre. In the end with
24 Mr. Tyre, with any witness, you put together all the factors
25 that your judgment would direct you to consider in making

1 jwh27

2 your overall determination as to credibility.

3 Now, as to that, as we approach the end of these
4 instructions, in judging credibility, in judging all the
5 questions that will be left with you now, remember that
6 there will be 12 of you in the jury room. That means obviously
7 that you are expected to go to the jury room and reasonably
8 get together. It means that each of you is not only entitled
9 but expected to contribute your own wisdom and your own
10 thought to this collective task of judgment.

11 By the same token, it means that each of you will
12 go to the jury room prepared to listen courteously and
13 thoughtfully to the views expressed by your fellow jurors.

14 I think you know, but just in case I remind you,
15 that in order to reach any verdict either way on either
16 defendant you must be unanimous. At the same time the unani-
17 mous verdict of the jury must represent the individual
18 judgment and conscience of each member of that jury. That
19 means that if you are reasoning together and you are led ra-
20 tionally to believe that a view you heard at an earlier time
21 was wrong you won't hesitate to change it. It means also
22 that if you hold a view in good conscience you won't feel
23 obliged to or permitted to give it up just because you happen
24 at some point to find yourself in a minority.

25 Now, if during your deliberations you think

1 jwh28

2 you want to hear any part of the testimony again or see
3 any of the exhibits send us a note through your foreman
4 and we will find what it is you need and supply it to you.

5 If you need to hear any of these instructions
6 again send us a note about that and we will try to comply
7 with that request.

8 If you are sending a note at any point and you
9 are divided at that particular time don't tell us how the
10 vote stands, don't tell us the division. It is a private
11 matter for the jury and not one that we ought to be involved
12 in.

13 Remember what I have stressed earlier; there are
14 two separate individual defendants on trial here. You are
15 to reach a separate and distinct verdict on each of them.

16 Our practice in this court is to have verdicts
17 delivered orally in open court rather than in a note. So
18 when you reach a verdict you will let it be known and come
19 in here and your foreman will announce it on your behalf.

20 Before I let you retire let me consult with
21 counsel and see if there are exceptions or other additional
22 different things they want told to the jury.

23 Does anybody want to come to the side bar?

24 MRS. BARLOW: No, your Honor.

25 THE COURT: Mr. Curley?

1 jwh 29

2 MR. CURLEY: No.

3 MR. FORTUIN: The government has no exceptions.

4 THE COURT: In that event let us have the
5 marshal sworn and the jury may retire.

6 (Deputy marshal sworn)

7 THE CLERK: The jurors will please go with the
8 marshals.

9 (The jury left the courtroom at 12:34 P.M.
10 to commence deliberations.)

3
1d
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: 7-2-74

Time Interview Commenced: _____ a.m. _____ p.m.

Q. my name is James L. Murphy, Jr. I am an Assistant United States Attorney. You have been arrested for a violation of 21 U.S.C. § 846 which relates to cannabis & hashish. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Right.

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Right.

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Right.

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Right.

Q. If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A. Right.

Q. Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?

Rev. 5-28-66

Name: *NEPETH SMITH*

7 years married
Marital Status: *Quint. Primary* Age: *4-18-35*

Aliases: *None*

Children: *20th Street Building* Other Dependents: *None*

Address: *1015 2nd Street*

Apt. No.

Rent:

Period:

With Whom Residing: *Wife*

Citizen of: *USA*

Registered as an Alien: *No*

Entry to U.S.

Registered with Selective Service
Military Service, Discharge:

Employed:

Wages: *\$105.00*

Previous Record:

Addict:

US Army Korean War as needed
discharged 1955 APC, Honolulu
Smith Smith, Fremont & Monterey Ave.
\$2.00 a week for house.
1954 convicted for selling marijuana, served 6 years
gambling conviction
add. 30 day cocaine.

Smile a little more.

Defendant's Statement:

Q. Now you're charged with Frank Vigore - is that right?
A. Yes. Is your understanding that charge.

Q. Yes.

Q. Now that the agent you were going to get for the
time being is that right?

A. That's right.

Q. How much money was it?

A. Well, he didn't know exactly what it was.

Q. Now, thought maybe I was in it?

A. Now, Sammy asking, is your father in it?

Q. No.

Q. Now, are you going to get the money from him?

A. Yes, I am going to get the money from him.

1. I don't know where he is.

2. I don't know where he is.

3. I don't know where he is.

4. I don't know where he is.

5. I don't know where he is.

6. I don't know where he is.

7. I don't know where he is.

8. I don't know where he is.

9. I don't know where he is.

10. I don't know where he is.

11. I don't know where he is.

12. I don't know where he is.

13. I don't know where he is.

14. I don't know where he is.

15. I don't know where he is.

I show you this statement, read it, if you
have any questions, make them, I will answer
and you sign it.

16. Frank Smith

ONLY COPY AVAILABLE

Defendant's Statement continued:

Time Interview Terminated: _____ a.m. _____ p.m.

Witnessed: Assistant U.S. Attorney _____

Agents: Edward J. Maguire _____

Bail recommended:

ROR LTAC

Possible bail suggested
by defendant:

Bail set by Magistrate:

Time of
arraignment: _____ a.m. 5:40 p.m.

Hearing:

7-22-75

STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: 2-3-71

Time Interview Commenced: _____ a.m., _____ p.m.

Q. My name is James Earl Ray, I am an Assistant United States Attorney. You have been arrested for a violation of 2-1-1968 which relates to murder of Martin Luther King. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Right.

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Right.

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Right.

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Right.

Q. If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?

A. Right.

Q. Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?

D-1

Form No. USA 33a-306 p.2
Rev. 6-28-66

Name: *KENNETH SMITH*

10 years common law
Marital Status: *9. min. 2nd way* Age: *4-18-30*
Brown, N.Y.

Aliases: *AK*

SS: 042229471

Children: *Not that in living* Other Dependents: *None*

Address:

Apt. No.

Rent:

Period:

1015 East 22nd Street

Brown, N.Y. 10024

2nd floor

\$1.50

9 years

With Whom Residing:

Wife

Citizen of:

USA

Registered as an Alien: ☒

Entry to U.S. ☒

Registered with Selective Service
Military Service, Discharge:

US Army Korea War as medic

Employed:

Wages:

discharged 1955 PFC (Contractor)
Social Service, Tremont & Monterey Ave.

Bx. as a clerk in Indus.

Addict:

yes. 30/day cocaine.

Smoke a little reefer.

Defendant's Statement:

Q. You told the agent you were going to get the heroin from Bumpy, is that right?

A. That's right.

Q. How much heroin was it?

A. Well he didn't know exactly what it was but he must have thought maybe it was an eighth.

Q. Was Bumpy waiting for you that night?

A. No.

Q. How were you going to get in touch with him?

Q. Where's Bumpy's house?

A. 22 1/2 Street.

Q. How long did you stay there?

A. 24 hours.

Q. What is Bumpy look like

A. Short, stocky, wear glasses. About 12, 13.

Q. Does he have lumps on his face.

A. Yeah, showing bumps.

Q. What color is he.

A. Black.

Q. Where does he live on 22nd Street

A. 2nd floor, 1063.

Q. How much were you going to get for this.

A. I couldn't tell you. I probably he took some of it, took some of the money, if there was some money.

Q. I show you this statement, read it, if you have any corrections, make them, if it's true and correct sign it.

A. Francis Smith

Form No. U.S.A. 33s-306 p.3
Rev. 6-28-66

Defendant's Statement continued:

Time Interview Terminated: _____ a.m. _____ p.m.

Witnessed: Assistant U.S. Attorney _____

Agents: David D. Moore 971-2856

Bail recommended:

Possible bail suggested
by defendant:

Bail set by Magistrate:

Time of
arraignment: _____ a.m. 4:20 p.m.

Hearing:

7-22-74

CSA

US v Wingate 1
and Smith
12/27/74 2
74 Cr. 860
(Frankel, D.J.)
'suppression
(hearing) 4

jws

50

MISS BARLOW: I call the defendant, your

Honor.

--

K E N N E T H L. S M I T H , called as a witness

in his own behalf, being first duly sworn, testified

as follows:

DIRECT EXAMINATION

BY MISS BARLOW:

Q Mr. Smith, do you recall the circumstances
surrounding your arrest of July 2nd, 1974?

A Most of it.

Q What time were you arrested?

A About 3, 3.30.

Q Where did the arrest occur?

A At the airport.

Q Which airport?

A Kennedy, I believe. Kennedy, or one --
LaGuardia.

Q At the time that you were arrested, why were
you at the airport?

A Wingate asked me to take him to the airport and
I explained -- I was explaining to him that I didn't have
any gas and that I wasn't feeling too well. He say he
would buy me some gas and I took him to the airport.

jws 2

Smith-direct

Q At the time that you were arrested, were you addicted to the use of any narcotic drug?

A Yes.

Q What drug?

A Heroin and cocaine.

Q And at the time of your arrest, how much heroin and/or cocaine did you use in the course of a day?

A I would say about half a quarter.

Q And what --

THE COURT: Half a what?

THE WITNESS: Half a quarter.

THE COURT: Half a quart?

THE WITNESS: A quarter.

THE COURT: Half a quarter?

THE WITNESS: Yes.

THE COURT: A quarter being what?

THE WITNESS: A quarter of a spoon.

THE COURT: A quarter of a spoon?

THE WITNESS: Right.

THE COURT: And you used a half of that?

THE WITNESS: Right.

Q What was the cost of that amount of narcotics on that day?

THE COURT: "Narcotics" is a very general word.

jws 3 Smith-direct

Q The heroin you used at the time you were arrested, how much did that cost you a day?

A \$40, \$45.

Q How often during the course of this day that you were arrested did you use heroin?

A I didn't have any that day.

Q You didn't have any that day?

A That's why I explained to you I didn't want to take him to the airport.

Q When was the last time you had heroin?

A I think it would be the night -- it had to be the morning -- I'm sorry, that would be the next day.

Q The morning of the same day?

A No.

Q The morning of July 1st, actually?

A It had to be early in the morning of July 1st.

Q What was your physical condition at the time of your arrest?

A It only lasts three hours, four hours.

MR. CURLEY: Excuse me?

THE WITNESS: I only lasts three, four hours.

Q You mean the effects of the heroin?

A Yes.

Q What amounts when the heroin --

1 jws 4 Smith-direct

2 A All different ways heroin acts. He said he
3 knows withdrawal pains, but he doesn't know withdrawal
4 pains.

5 Q On the day of your arrest, were you going
6 through withdrawal?

7 A Just about.

8 Q What symptoms were you feeling?

9 A Nose, my eyes, you know like pains, abdominal
10 pains.

11 Q Where did you have the pains?

12 A Abdominal pains.

13 Q Now, at the time of your arrest did you ask for
14 any medical attention?

15 A I was asking the officer that was just on the
16 stand for medical attention that night and they told me --
17 they say, "As soon as we take you to West Street we will
18 see you get medical attention."

19 I think Mr. Wingate was with me. And when we
20 got inside I told Mr. Wingate I was going to see the guard,
21 see if I could get some attention, because I don't think I
22 could be here too long before we went into --

23 Q Did you ask for medical attention when you got
24 to West Street?

25 A Right, they took me upstairs.

1 jws 5 Smith-direct

2 Q What happened?

3 A I didn't get any. They told me when I come
4 back from the court.

5 Q What time did you get to West Street?

6 A Morning, early morning.

7 Q Approximately, if you remember, how many hours
8 from the time that you last had taken heroin?

9 A I didn't understand.

10 Q Approximately how long was it from the time that
11 you last took heroin to the time you arrived at West Street?

12 A It might have been a good 18, 20 hours, maybe
13 23 hours.

14 Q At the time that the officer was reading you
15 your rights, at the airport and at the D.E.A. headquarters,
16 did you understand what was going on?

17 A I don't even remember him reading rights when
18 he had us standing up with the pistols at the airport.
19 That's the only thing I remember, when he was doing that.
20 Listen, I was too scared to move. They told us, "If you
21 move, we're going to kill you," or something, "If you
22 move."

23 They had Mr. Wingate on the other side of the
24 car and had me --

25 Q The only time you remember the rights being

1 jws 6

Smith-direct

2 read to you that night was at the immediate time of your
3 arrest?

4 A If they read it to me at the headquarters, I
5 don't remember.

6 Q At the airport, when they read it to you, did
7 you understand it?

8 A I wasn't interested about what he was reading.
9 I was trying to talk what he was arresting me for. So he
10 told me, "Shut up or I'll kill you," and there was no more
11 for me to say. He had pistol on him.

12 Q What time did you arrive at the Courthouse the
13 next morning?

14 A I would say about 10. I believe it was about
15 10.

16 Q 10 a.m.?

17 A It had to be about 10 because we waited about
18 two hours before he would see me.

19 Q When you arrived at the court, where was the
20 first place they took you?

21 A I thought he was going to take me to get
22 medication at one of the offices, I guess, but they took us
23 straight upstairs to the Attorney General's office.

24 Q You mean the U. S. Attorney's office?

25 A And we sat there for two hours.

2 Q Did you ask him for attention?

3 A Of course I asked two or three times.

4 Q Whom did you ask?

5 A One of the officers that was sitting there, I
6 think Mr. Nash, and he was telling me as soon as I finish
7 inside they would see that I get the medical attention.

8 Q And when you got to the court what was your
9 physical condition?

10 A You mean downstairs at the arraignment?

11 Q No, when you got to the court in the morning at
12 10 a.m., what was your physical condition?

13 A I sat there, but I can't really -- I sat down,
14 but I can comprehend certain things, but like what was on
15 my mind was getting out, just getting out of this predica-
16 ment.

17 Q Did the agents say anything to you about what
18 you could do to help yourself to be released?

19 A He didn't put it -- it's not like that.

20 Q What did the agent say to you?

21 A He said he would see that I get back in the
22 street if I would work with them.

23 Q And who said that?

24 A Magnuson -- Ed Magnuson. Now, when he told
25 me this, I'm thinking of one thing, getting in the street.

1 I don't know how I'm getting in the street. I can sit
2 through anything. I can sit through anything if I thought
3 I'm going to get back in the street because I was --

4
5 Q What did you answer the agent when he told you
6 that?

7 A I told him "Yes" because it didn't matter.
8 All I know whatever I had to tell him would be the right
9 thing at that time. Exactly what I told him, I couldn't
10 tell you what. Whatever it was was going to have to be the
11 right thing because he told me --

12 Q The right thing for what?

13 A Because he told me if I would tell him some-
14 thing, everything -- I got the name I grabbed out of the
15 air on my papers there. I heard it on the street and I
16 knew it and I grabbed it and gave it to him for the simple
17 reason I'm not thinking about this man's position, Mr.
18 Wingate, I'm not thinking about nobody's position but mine
19 right then to get back in the street and I would tell them
20 anything, I don't care what it is.

21 Q Are you saying that the statements you made at
22 the time you were arrested were not true?

23 A I couldn't tell you, Miss Barlow. I couldn't
24 tell you if I remember because --

25 THE COURT: No, answer the question. Did you

1 jws 9 Smith-direct

2 tell them false things? Did you tell the U. S. Attorney
3 false things?

4 THE WITNESS: Might be false things.

5 THE COURT: Were they?

6 THE WITNESS: I'm not quite sure.

7 THE COURT: Read them to him.

8 And tell us whether they are true or false.

9 Q Mr. Smith, on the morning after your arrest
10 when you spoke to the United States Attorney you were asked
11 this question and you have this answer:

12 "Q You told the agent you were going to get
13 the heroin from Bumpsie; is that right?

14 "A That's right."

15 Was that statement true?

16 A Excuse me -- but it wasn't asked me like tis.
17 The question was asked me, "Do you think if you can go on
18 the street that you can get some heroin."

19 I said, "Yes."

20 What else is there for me to say?

21 Q In other words, he asked you --

22 A I don't want to sit here and perjure myself
23 because I might have said yes to him, but I can't remember
24 that far back what I was saying to them.

25 THE COURT: You are being asked now whether those

1 jws 10

Smith-direct

2 statements are false. Are they false statements?

3 Read them to him.

4 Q Mr. Smith, you were asked by the United States
5 Attorney:

6 "Q You told the agent you were going to get
7 the heroin from Bumpsie; is that right?

8 "A That's right."

9 THE COURT: Is that true or false?

10 THE WITNESS: That was false.

11 THE COURT: Do you want to read the rest?

12 MISS BARLOW: Your Honor, I think that is the
13 key statement and there are others which are in similar
14 vein. It's all --

15 THE COURT: There are some in connection with
16 Mr. Wingate, but I would like to hear what he said about
17 him.

18 MISS BARLOW: Would your Honor want me to go
19 through the whole thing?

20 THE COURT: Just the ones that seem more or less
21 incriminating.

22 Q You were asked by the United States Attorney:

23 "Q What was Frank Wingate supposed to do?"

24 And the answer was:

25 "He might of" -- and then there was nothing

1 after that.

2 You were then asked by the U. S. Attorney:

3 "Q He set it up right. He set you up."

4 And you answered, "Right."

5 Now, were the answers to those questions false?

6 A Yes, I believe so.

7 Would you ask that again so that I can get it
8 clear in my mind?

9 Q Okay.

10 Now, why did you give false answers --

11 THE COURT: No, he asked you to read it again.

12 MISS BARLOW: Sorry.

13 Q The question was:

14 "Q What was Frank Wingate supposed to do?"

15 And the answer was not complete. It was --

16 "A He might of --"

17 The next question was:

18 "Q He set it up; right? He set you up?"

19 And the answer was "Right."

20 Were the answers to those questions false?

21 A Yes, those were false because they were leading
22 questions. It wasn't the way it was put to me.

23 Q Why would you give the U. S. Attorney false
24 answers?
25

jws 12

Smith-direct

1 A I told you I definitely wanted to get to the
2 street. In the street I could have gotten myself some
3 heroin. I was getting sick and when you're sick you can
4 play any part.
5

6 Q Were you in pain?

7 A I was in pain.

8 Q What kind of pain?

9 A I was in pain enough to sit there and sign for
10 Mr. Murphy things.

11 Q You are not answering my questions.

12 A I am trying to tell you so you can understand.
13 I was in pain to sit up straight. Frank kept nudging me
14 to sit up, but I told him I was sick and I wanted to get
15 out of here.

16 Q Did the United States Attorney discuss with
17 you the questions of the task program?

18 A He told me this -- while we was waiting to go
19 inside the Attorney General's office, he told me -- he said,
20 "Well, what we are going to do, we going to put you on the
21 program and we going to let you go back in the street," he
22 said, "but when you go back in the street you know maybe
23 you can do something for it, get us an eighth or some-
24 thing."

25 I don't buy eights. They know my background.

1 jws 13 Smith-direct

2 They know what I do, but I wouldn't sell them anything.

3 I'm not a seller, I'm a user.

4 Q Did they make any statement to you about the
5 program and what would happen if you came to court?

6 A He said, "We going to take you downstairs to
7 the arraignment and all you have to do -- the judge is going
8 to let you go and you go back in the street." And he
9 gave me a number to call him.

10 Q At what time were these statements made to you?

11 MISS BARLOW: I will rephrase that.

12 Q Was it made to you before or after your talk
13 with the U. S. Attorney?

14 A Before, before I talked to the Attorney General,
15 the officer told me.

16 Q Did the U. S. Attorney make any statements to
17 you?

18 A Yes, he told me -- he say he couldn't understand
19 why -- something about my Army record, but the usual, it
20 doesn't make no difference why he couldn't understand why
21 I was a drug user, but he was telling me that he was going
22 to try to help me and he was going to put me in the program.

23 Q Did he make those statements to you before or
24 after you gave those statements?

25 A I think he told me that before I made the state-

1
2 ment.

3 THE COURT: You are pretty sure of that?

4 THE WITNESS: Right, because the reason he told
5 me that I don't understand because he was telling me about --
6 he said, "I don't understand why with your record, your
7 Army record and your, what you call it, that you should be
8 in this hear kind of business" -- something on that order --
9 "but I'm going to try to help you because the officer told
10 me when he walked into the Attorney General's office that
11 in order for us to do something for you you have got to do
12 smething for us."

13 And he said, "If I can talk the Attorney General
14 to getting you into a program would you help?"

15 And quite naturally I'm going to say yes, and
16 I don't care if I got in a jam like I'm in a jam.

3 17 THE COURT: Let me understand. You heard
18 the first witness, the Assistant United States Attorney?

19 THE WITNESS: Yes, sir.

20 THE COURT: You are saying he spoke to you
21 about the Task program before you signed the statement?
22 Is that what you are saying?

23 THE WITNESS: Exactly -- not Task. He said
24 he would help me, but I was outside, the officer, the
25 agent --

1 jws 15 Smith-direct

2 THE COURT: Just answer my question because
3 you say you don't want to perjure yourself and you are
4 right.

5 Did he offer to help you before you signed this
6 statement that you are testifying about?

7 THE WITNESS: He said he would help me.

8 THE COURT: He did? Before you signed the
9 statement?

10 THE WITNESS: Yes, he would help me. Between
11 the two that's what he told me.

12 MISS BARLOW: I have no further questions.

13 CROSS EXAMINATION

XX

14 BY MR. FORTUIN:

15 Q Did he tell you that he would help you if you
16 made a statement?

17 A He didn't have to tell me that. The agent
18 told me.

19 Q The agent told you that outside?

20 A Yes.

21 THE COURT: Just answer the question.

22 Q Did the Assistant United States Attorney ever
23 tell you that he would help you in this program if you made
24 a statement?

25 A He didn't say the program, but he said he would

1 help me.

2 Q If you made a statement?

3 A Now, I'm not too correct on that. I couldn't
4 speak on that because I wouldn't understand he said if I
5 made a statement now, but all I know he said he would help
6 me.

7 Q In other words, he talked about your war
8 record --

9 A He did not tell me about a statement I can't
10 remember, you see. I'm not going to say something I don't
11 understand.

12 Q He told you he didn't understand because of
13 your war record and that is the reason he would get you in
14 a program?

15 A He said, "I will help you."

16 Q He didn't say he wouldn't help you if you didn't
17 make a statement?

18 A I don't know. I couldn't remember exactly if
19 he said, "I would help you if you made the statement."

20 He said, "I would help you." I was taking it
21 for granted when I was outside talking to the agent --

22 Q Just tell us what he told you.

23 Did he ever tell you that he would only help
24 you if you made a statement?
25

1 jws 17

Smith-cross

2 A Well, in the way you putting it I don't know
3 if he said it like that, or he might have said it like
4 that. I can't tell you exactly which way he said it.

5 Q But he told you he wanted to get you in the
6 program because of your past military record: is that
7 correct?

8 A He didn't say because of my military. He say,
9 "I couldn't understand, but I would help you." That's
10 the way he put it. That's the way I recollect it.

11 Q You said you would say anything because you
12 wanted to get out on the street. Is that your testimony?

13 A That's right.

14 Q Why did you want to get out on the street?

15 A So I could get more drugs. I'm a user.
16 I was sick, in fact.

17 Q That was the only reason you wanted to get out
18 on the street?

19 A That's the only reason.

20 Q That's the only reason you made the statement?

21 A Well, it was put to me I could make the state-
22 ment, or they was going to take the car, "We have some drugs
23 on you, don't worry, we have you so set so we can get to
24 you."

25 Q So the reason --

1 jws 18

Smith-cross

2 A I figured I would stay in jail and I didn't have
3 no bail bond, nothing like that, so I figured I would like
4 to get back in the street.

5 Q So someone told you if you made a statement that
6 they would release you that day?

7 A Yes.

8 Q Who told you that?

9 A Officer Magnuson said, "You would be back on the
10 street today."

11 Q If what?

12 A He say like "If you would help us." And he
13 said, "If you help us you be back in the street, we can
14 get you back on the street."

15 Q By helping, did they tell you what that meant?

16 A Yes, they say if I would go out and try to
17 obtain some drugs for them.

18 Q To introduce them to other people who would give
19 them narcotics?

20 A That I would get an eighth of drugs, something,
21 right, some people. He said, "You can't -- you got to
22 get somebody bigger than yourself."

23 Q You stated in your testimony that you used
24 cocaine; is that correct?

25 A I use cocaine and heroin. I don't know what's

jws 19 Smith-cross

the testimony.

Q Well, you signed an affidavit that you signed in this court; is that correct? Do you recall that?

A Something I signed, yes.

THE COURT: What did you say?

THE WITNESS: I might have. The way I feel I might have signed anything.

Q I am not talking about when you were talking to the Assistant United States Attorney. I am talking about a paper you signed with your lawyer to be filed in this case. Did you sign that?

A I don't know.

MR. FORTUIN: Do you have the original?

THE COURT: Here is the original.

MR. FORTUIN: Can we mark that as Government's Exhibit 5 for identification.

(Government's Exhibit 5 was marked for identification.)

Q I show you, Mr. Smith, Government's Exhibit 5 for identification and the second page.

Is that your signature?

A Yes.

Q And you signed this statement and swore to it in front of a notary; is that correct?

1
2 A Yes.

3 Q And when you made it, you knew it was a sworn
4 statement; correct?

5 A I guess it's a sworn statement, I don't know.
6 I seen it, but, you know, like I signed it --

7 Q Well, you discussed it with your lawyer prior
8 to signing it; is that correct?

9 A I guess so.

10 Q You spent some time with her, I assume?

11 A Not too much time.

12 Q Prior to the time you signed the statement, how
13 much time had you spent with her discussing it, with your
14 lawyer?

15 A To tell you the truth, I don't remember the
16 statement, but I signed it.

17 Q You don't withdraw from cocaine; is that
18 correct?

19 A No.

20 Q So that if you were just a cocaine user, no
21 matter how much cocaine you used you would never be in any
22 physical distress; is that correct?

23 A Oh, no, you can be physical effect with cocaine
24 if you use cocaine for -- quite a few ways to use cocaine.
25 I don't know if you ever used it or not.

jws 21 Smith-cross

Q I haven't. But the way you used it you snorted it; is that correct?

A Yes, I snorted.

Q That's about how much, \$50 a day?

A Not that much.

Q So you didn't --

A When I used it I use about \$40 worth.

Q When you used it --

A I have heroin every day. If I didn't have heroin I would be in physical distress.

Q When you signed the statement, you didn't say anything about heroin, did you?

A I --

Q Let me read from your sworn statement.
It says -- Paragraph 5:

"At the time of the arrest I was a user of cocaine and I was brought into the Courthouse.
I was ill."

Did you say that?

A I was a drug addict for 20 years.

Q Did you say that in your statement you made, filed with the court?

A That was here --

Q Could you show me anywhere where you said

1 jws 22 Smith-cross

2 "heroin"?

3 A No, it's not there.

4 Q So you didn't use the word "heroin"?

5 A No. I don't think it makes any difference.

6 I can go to the doctor and you --

7 Q When you signed the statement in the court --

8 A When you say -- I'm telling you I'm a drug
9 addict, I use heroin and cocaine. What you try to say
10 is nothing. I'm not going to put myself in jail with
11 another statement.

12 THE COURT: He is right, Mr. Fortuin.

13 Q I show you the statement you signed, Govern-
14 ment's Exhibit 3 for identification -- and, incidentally,
15 prior to signing this, Mr. Murphy asked you, did he not,
16 to make any corrections in the statement that you might
17 have?

18 A He said I wrote it. I don't know. I don't
19 think I wrote it.

20 Q This is your signature, is it not?

21 A No, he said I wrote out the statement, or some-
22 thing.

23 Q Is that your signature?

24 A Yes.

25 Q And prior to signing it, Mr. Murphy asked you

1 jws 23 Smith-cross

2 to make any corrections in it; is that correct?

3 A He might have. If he said he did, most likely
4 he did.

5 Q You signed the statement?

6 A Yes. I went down to the judge and signed some
7 papers down there. What it was I don't know to this day.

8 Q Did you tell Mr. Murphy anything about using
9 heroin?

10 A Sure. I told him inside I'm a drug addict.

11 Q Did you tell anyone else you used heroin at
12 any time?

13 A I don't have to tell. Everyone knows I use.

14 Q How is it everyone know that?

15 A When I'm in the street, you know, when a man is
16 using heroin --

17 Q You did tell Mr. Murphy that. Is that your
18 testimony?

19 A I told him I was a drug addict.

20 Q You told him you were a heroin addict?

21 A No, I didn't say "heroin."

22 MISS BARLOW: Objection. He said a drug
23 addict.

24 THE COURT: I think we ought to move on, Mr.
25 Fortuin.

1 jws 24 Smith-cross

2 MR. FORTUIN: I will.

3 Q You also gave the agent other information other
4 than just your signed statement; is that correct?

5 A We wrapped and like I would do anything to
6 appease me as far as us talking, I guess so.

7 Q Did you tell him about a Roosevelt Bentley, for
8 example?

9 A No, they told me they seen me with him or they
10 say they know where he was, so I must have said yes.

11 Q And you supplied them with some information
12 about Mr. Bentley, did you not?

13 A I don't believe I did. Maybe I did if he asked
14 it, or they put it the way they want on paper, I might have.

15 Q You say that the statement you made to Mr.
16 Murphy, that was something you made up as you went along;
17 is that correct?

18 A I can't hear you.

19 MISS BARLOW: Your Honor, I object to the ques-
20 tion with regard to information that my client allegedly
21 gave to the officers on the ground that I had previously
22 asked the Government for any and all statements made by my
23 client to the Government. I was delivered what I believe
24 to have been all the statements that my client made and I
25 am now being apprised that there is additional material

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jws 25

Smith-cross

74

that I was not apprised of.

THE COURT: Overruled.

Read the question and the witness may answer.

(Read.)

THE COURT: Answer the question, please.

THE WITNESS: Oh, you're talking about me?

THE COURT: Yes.

A Well, it was partially made up and partially put together, you know. It wouldn't be an exact truth, I don't think, because like I told you the people I was speaking about, I heard the name, something like that. I don't even know the people, but I made the name because I thought maybe he was a big time and maybe they would know him, but I would do this in order I could get away.

Q You mentioned a person by the name of Bumpsie; is that correct?

A Right.

Q And you said that's where you were getting heroin from; right?

A That's the name I heard.

Q Was that true?

A No, I never spoke to that man about no drugs or anything.

Q Then they asked you what did Bumpsie look like

jws 26 Smith-cross

and you answered short, stocky, he wears glasses and he's about 42 or 43; is that correct?

A No, I didn't say that. They was telling me "Is he short, stocky," and I was saying, "Yes, sir."

"Did he wear glasses?"

I say, "Yes, sir." And that was it.

Q That description was something Mr. Murphy came up with and you just went along with it?

A He didn't have -- that he came up with?

Q Yes.

A No, he didn't come up with it. Mr. Murphy didn't ask me about it. One of the other agents asked me about it. One of the agents was asking me about him, they was giving me a description of it. When I went to the Attorney General's office he probably had the information so he probably asked, but he just couldn't pick it out of the air like that.

Q So that was something you supplied, the description?

A Sure, I gave it just the way I thought it was because I heard of this man. I heard of people speaking of him, but I never even was sold dope from him.

Q Did you testify that the officers told you about this program before you went to see Mr. Murphy?

1 jws 27 Smith-cross

2 A That's right. No, he didn't -- yes, he said,
3 "Well, we have something" -- no, he said, "We would put you
4 in a program." He didn't say nothing about the Task,
5 but he said, "I will put you in a program and get you back
6 on the street."

7 Q Now, at the time of your arrest you were employed
8 is that correct?

9 A I didn't hear you.

10 Q At the time of your arrest you were employed?

11 A Yes.

12 Q And you were employed with -- what was your job?

13 A I am a clerk'

14 Q For whom?

15 A Social Services.

16 Q New York City Department of Social Services?

17 A Yes.

18 Q That was not the first time that you had been
19 arrested, was it?

20 A They had arrested me twice. No, that's the
21 first time I had been arrested.

22 Q But you were arrested on several occasions prior
23 to that so it was not a completely unique experience to you?

24 A What's that?

25 Q It was not a completely unique experience to you?

1 A Well, the last time I was arrested I didn't
2
3 do nothing -- I really tell you -- you say it's not a
4 unique experience like you say I'm slick or something and
5 I get arrested. Is that what you're trying to say?

6 MISS BARLOW: Your Honor, I object to this line
7 of questioning and my information with regard to the
8 defendant's previous arrest, his last arrest was approx-
9 imately 1959.

10 THE COURT: Why is that a ground of objection?

11 MISS BARLOW: I believe that was my client's
12 only arrest.

13 THE COURT: Whatever you believe is not a
14 ground for an objection to the question.

15 THE WITNESS: I have been arrested two or three
16 times.

17 MISS BARLOW: I object to the question with
18 regard to the uniqueness --

19 THE COURT: I will sustain the objection to
20 that line of questioning.

21 MISS BARLOW: The uniqueness?

22 THE COURT: Yes.

23 Q You were arrested, Mr. Smith, were you not, in
24 February 1973 by the New York City Police Department?

25 A Right.

5

1

jws 29

Smith-cross

2

Q

And you were arrested prior to that in August of 1970 by the New York City Police Department?

4

A

What were the charges?

5

Q

That was a gambling charge.

6

A

What was the other charge, sitting in a car with someone with a pistol?

8

Q

Grand theft of an auto.

9

MISS BARLOW: Your Honor, may I ask if the

10

U. S. Attorney has a copy he can supply me with?

11

MR. FORTUIN: Certainly.

12

Q

You were also arrested prior to that in 1970, in June; is that correct?

14

A

For the gambling.

15

Q

That was felonious possession of a dangerous weapon, a 22 caliber gun?

17

A

That was dismissed.

18

Q

But you were arrested for that?

19

A

Yes, if you want to put it like that.

20

Q

You were arrested in 1958 and in fact served time on those charges; is that correct?

22

A

Right.

23

MR. FORTUIN: Your Honor, I have no further

24

questions.

25

MR. CURLEY: Your Honor, I interpreted some of

1 jws 30

Smith-

2 the Court's comments to indicate interest in Mr. Smith's
3 answers that could have bearing on truthfulness and then
4 we had questions and answers concerning the interview with
5 Mr. Murphy and previously outside Mr. Murphy's office with
6 Mr. Magnuson.

7 I would like somebody, possibly myself, to go
8 into the alleged statements made to the agent at the
9 Regional office.

10 THE COURT: For what purpose?

11 MR. CURLEY: As to whether or not they were
12 truthful.

13 THE COURT: For what purpose do you get up?

14 MR. CURLEY: Well, subject to your Honor's
15 ruling as to the admissibility of these matters, I would like
16 to be in a position for a possible offer of proof concerning
17 a separate trial concerning these questions, if any of these
18 matters come in on either the direct or indirect testimony
19 concerning my client as to the availability of Mr. Smith as
20 a witness for Mr. Wingate. Since Miss Barlow may not
21 choose to have him testify I would like to be in a position
22 to make some kind of an offer of proof that the statements
23 allegedly made by Mr. Smith which involve my client are
24 contested as to their truthfulness by Mr. Smith under
25 oath.

2 THE COURT: I don't think that is appropriate
3 for this proceeding. We are having a motion to suppress
4 now and I don't want to bring in anything that somebody
5 happens to think of. Your application is denied.

6 As to whether there will be a severance, that
7 is a separate question and if the Government intends to
8 offer anything incriminating to your client in the way of
9 a statement by Mr. Smith they will have to tell you and me
10 about it and then we will consider that. However, I am
11 not going to turn this into a portion of an application
12 for a severance at this time.

13 Do you have any redirect, Miss Barlow?

14 MISS BARLOW: Yes, one or two questions.

15 REDIRECT EXAMINATION

16 BY MISS BARLOW:

17 Q Mr. Smith, can you tell the Court what was the
18 result of the gambling arrest?

19 MR. FORTUIN: This is irrelevant. The result
20 of the charge is irrelevant.

21 THE COURT: She can go into the nature of the
22 experience. I am not sure it will be very useful to go
23 into it at all.

24 Q What was the disposition of that charge?

25 A I was charged \$75 fine.

jws 32 Smith-redirect

Q When you were arrested in 1970, do you recall whether at the time of your arrest you were warned of your right to remain silent?

A Was that the one with the automobile?

Q That was the gambling charge.

A I don't think so. I don't believe so. We were all just taken down and was let out the next morning.

Q In June of 1970 you were arrested for possession of a dangerous weapon. What happened to that case? How was it disposed of?

A That was dismissed.

Q I am just asking you how it was disposed of.

Do you recall when you were arrested on that charge whether you were asked questions by the officer with regard to your right to remain silent?

A I doubt if I was. There is only one I remember being asked.

Q What was that?

A That was the one about the car. I do remember.

Q What happened after the arrest with the car?

A I was put on probation.

MR. BARLOW: No further questions.

MR. FORTUIN: Nothing further.

THE COURT: All right, Mr. Smith, thank you.
(Witness excused.)



Certificate of Service

April 11 . 19 75

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheila Gustey